

Document: Proposed Rule, **Register Page Number:** 26 IR 67

Source: October 1, 2002, Indiana Register, Volume 26, Number 1

Disclaimer: This document was created from the files used to produce the official Indiana Register. However, this document is unofficial.

TITLE 25 INDIANA DEPARTMENT OF ADMINISTRATION

Proposed Rule LSA Document #02-150

DIGEST

Adds 25 IAC 5 concerning minority and women's business enterprises. Repeals 25 IAC 2-19 and 25 IAC 2-20. Effective 30 days after filing with the secretary of state.

25 IAC 2-19

25 IAC 2-20

25 IAC 5

SECTION 1. 25 IAC 5 IS ADDED TO READ AS FOLLOWS:

ARTICLE 5. MINORITY AND WOMEN'S BUSINESS ENTERPRISES

Rule 1. Scope of Activities

25 IAC 5-1-1 Duties of minority and women's business enterprises division

Authority: IC 4-13-1-4; IC 4-13-1-7; IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13-1; IC 4-13-16.5-1; IC 4-13-16.5-2; IC 4-13.6; IC 5-22

Sec. 1. The duties of the minority and women's business enterprises division, hereinafter referred to as the "division", shall be as defined in IC 4-13-16.5-2(f). (*Indiana Department of Administration; 25 IAC 5-1-1*)

25 IAC 5-1-2 Duties of the deputy commissioner, minority and women's business enterprises

Authority: IC 4-13-1-4; IC 4-13-1-7; IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13-1; IC 4-13-16.5-3; IC 4-13.5-1; IC 4-13.6; IC 4-13-16.5-3; IC 5-22

Sec. 2. The duties of the deputy commissioner of the division shall be as defined in IC 4-13-16.5-3. (*Indiana Department of Administration; 25 IAC 5-1-2*)

25 IAC 5-1-3 Policy statement

Authority: IC 4-13-1-4; IC 4-13-1-7; IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13-1; IC 4-13.5-1; IC 4-13.6; IC 5-22

Sec. 3. (a) It is the policy of the state to provide an equal opportunity for existing and operating minority and women's business enterprises to receive and participate in the state's procurement process. The department will act on behalf of the state to actively promote, monitor, and enforce its MBE/WBE program.

(b) The commissioner of the department, through the minority and women's business enterprises section of the department and in concert with the governor's commission on minority and women's business enterprises, shall be the final authority on all matters pertaining to the maintenance and administration of the MBE/WBE program and compliance thereto. (*Indiana Department of Administration; 25 IAC 5-1-3*)

Rule 2. Definitions

25 IAC 5-2-1 Definitions

Authority: IC 4-13-1-4; IC 4-13-1-7; IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13-1; IC 4-13.5-1; IC 4-13.6; IC 5-22

Sec. 1. (a) The following definitions apply throughout this article:

(1) “Application for MBE/WBE program waiver” or “application” means the document supplied by prime contractors to the state (usually required at the time of most bid submittals), which requests the contractor’s exemption from the contract goal and indicates the reasons why the contractor requires the exemption.

(2) “Broker” means a business entity serving as an intermediary who negotiates contracts of purchase and sale, without assuming any risk of loss.

(3) “Commission” means the governor’s commission on minority and women’s business enterprises.

(4) “Commissioner” means the deputy commissioner for minority and women’s business enterprises of the department.

(5) “Contract” means any contract awarded by a state agency for construction projects or the procurement of goods or services, including professional services.

(6) “Contract goal” means a targeted amount of participation as measured by the desired percentage of involvement by minority and women’s business enterprises.

(7) “Contractor” means a person or business entity who contracts with a state agency to provide goods or services.

(8) “Department” means the Indiana department of administration.

(9) “MBE/WBE program waiver” or “waiver” means the document supplied by the state to the prime contractor that approves the application for MBE program waiver.

(10) “MBE/WBE subcontractor plan” or “plan” means the document supplied by prime contractors to the state (usually required at the time of most bid submittals), which indicates the means whereby the minority business participation will be attained.

(11) “Minority business enterprise” or “MBE” means an individual, partnership, corporation, limited liability company, or joint venture of any kind that is owned and controlled by one (1) or more persons who are:

(A) United States citizens; and

(B) members of a minority group.

(12) “Minority group” means the following:

(A) Blacks.

(B) American Indians.

(C) Hispanics.

(D) Asian Americans.

(E) Other similar minority groups as defined by 13 CFR 124.103.

(13) “Offeror” means any business entity that makes an offer to enter into a binding contract for the provision of materials or services to a state agency.

(14) “Owned and controlled” means having:

(A) ownership of at least fifty-one percent (51%) of the enterprise, including corporate stock of a corporation;

(B) control over the management and active in the day-to-day operations of the business; and

(C) an interest in the capital, assets, and profits and losses of the business proportionate to the percentage of ownership.

(15) “Program” means the minority and women’s business enterprises program as administered by the department.

(16) “Qualifying member” means an individual who is socially disadvantaged.

(17) “Socially disadvantaged” or “disadvantaged” means an individual who has been subjected to racial or ethnic prejudice or cultural bias within American society because of their identities as members of groups and without regard to their individual qualities. The social disadvantage must stem from circumstances beyond their control. Being born in a country does not, by itself, suffice to make the birth country an individual’s country of origin for purposes of being included within a designated group.

(18) “State agency” means any of the following:

(A) An authority, board, branch, commission, committee, department, division, or other instrumentality of the executive, including the administrative department of state government.

(B) An entity established by the general assembly as a body corporate and politic.

(C) A state educational institution.

The term does not include the state lottery commission or the Indiana gaming commission with respect to setting and enforcing goals for awarding contracts to minority and women's business enterprises.

(19) "Subcontractor" or "second tier contractor" means any person entering into a contract with a prime vendor to directly furnish services or supplies toward the contract.

(20) "Supplier" or "distributor" means any business entity supplying materials, but no significant on-site labor is contributed in furtherance of the contract or to a vendor.

(21) "Vendor" means any person or business entity that has entered into a binding contract for the provision of materials or services to a state agency.

(22) "Women's business enterprise" or "WBE" means an individual, partnership, corporation, limited liability company, or joint venture of any kind that is owned and controlled by one (1) or more persons who are:

(A) United States citizens; and

(B) whose gender is female.

(b) A reference to a federal statute or regulation is a reference to the statute or regulation as in effect January 1, 2001.

(c) The department may develop policies and procedures for certain industries to further define certification status as needs arise.

(d) Notwithstanding this section, with reference to business certification status as a broker or supplier, historic purchasing practices, standards for the industry, and other criteria such as risk of loss may be considered. *(Indiana Department of Administration; 25 IAC 5-2-1)*

Rule 3. Certification Standards

25 IAC 5-3-1 Certification policy

Authority: IC 4-13-1-4; IC 4-13-1-7; IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13-1; IC 4-13.5-1; IC 4-13.6; IC 5-22

Sec. 1. The department will act on behalf of the state to actively promote, monitor, and enforce the standards for certification of minority and women's business enterprises defined in this article. *(Indiana Department of Administration; 25 IAC 5-3-1)*

25 IAC 5-3-2 Burden of proof allocations in the process

Authority: IC 4-13-1-4; IC 4-13-1-7; IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13-1; IC 4-13.5-1; IC 4-13.6; IC 5-22

Sec. 2. (a) In determining whether to certify a firm as eligible to participate as an MBE or WBE, the department must apply the standards of this section.

(b) The firm seeking certification has the burden of demonstrating, by a preponderance of the evidence, that it meets the requirements of this section concerning group membership, business size, ownership, and control.

(c) The applicant is the qualifying member whose participation is relied upon to meet the ownership requirements.

(d) The department must make determinations concerning whether the applicant has met the burden of demonstrating group membership, business size, ownership, and control by considering all the facts in the record, viewed as a whole. *(Indiana Department of Administration; 25 IAC 5-3-2)*

25 IAC 5-3-3 Group membership determinations

Authority: IC 4-13-1-4; IC 4-13-1-7; IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13-1; IC 4-13.5-1; IC 4-13.6; IC 5-22

Sec. 3. (a) In determining whether the socially disadvantaged participants in a firm own the firm, the department must consider all the facts in the record, viewed as a whole.

(b) The following are requirements to demonstrate socially disadvantaged:

(1) The department must rebuttably presume that citizens of the United States who are women or minority, as defined in this article, are socially disadvantaged individuals. The department may require applicants to submit a signed, notarized certification that each presumptively disadvantaged owner is, in fact, socially disadvantaged.

(2) If the department has reason to question whether an individual is a member of a group that is presumed to be socially disadvantaged, it must require the individual to demonstrate, by a preponderance of the evidence, that he or she is a member of the group.

(3) If the department has reasonable basis to believe that an individual who is a member of one of the designated groups is not, in fact, socially disadvantaged, it may, at any time, start a proceeding to determine whether the presumption should be regarded as rebutted with respect to that individual. The department's proceeding must follow the procedures of 25 IAC 5-4.

(4) In such a proceeding, the department has the burden of demonstrating, by a preponderance of the evidence, that the individual is not socially disadvantaged. The department may require the individual to produce information relevant to the determination of his or her disadvantage.

(5) In making such a determination, the department must consider whether the person has held himself or herself out to be a member of the group over a long period of time prior to application for certification and whether the person is regarded as a member of the group by the relevant community. The department may require the applicant to produce appropriate documentation of group membership as follows:

(A) If the department determines that an individual claiming to be a member of a group presumed to be disadvantaged is not a member of a designated disadvantaged group, the individual must demonstrate social disadvantage on an individual basis.

(B) The department's decisions concerning membership in a designated group are subject to the certification appeals procedure of 25 IAC 5-4.

(6) When an individual's presumption of social disadvantage has been rebutted, his or her ownership and control of the firm in question cannot be used for purposes of MBE or WBE eligibility under this section unless and until he or she makes an individual showing of social disadvantage.

(Indiana Department of Administration; 25 IAC 5-3-3)

25 IAC 5-3-4 Business size determinations

Authority: IC 4-13-1-4; IC 4-13-1-7; IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13-1; IC 4-13.5-1; IC 4-13.6; IC 5-22

Sec. 4 (a) In determining whether the socially disadvantaged participants in a firm own the firm, the department must consider all the facts in the record, viewed as a whole.

(b) To be an eligible MBE or WBE, a firm (including its affiliates) must be an existing and operating small business, as defined by United States Small Business Administration (SBA) standards. The department must apply size standards found in 13 CFR 121, appropriate to the type of work the firm seeks to perform.

(c) Even if it meets the requirements of subsection (a), a firm is not an eligible MBE or WBE in any federal fiscal year if the firm (including its affiliates) has had average annual gross receipts, as defined by SBA regulations (see 13 CFR 121.402), over the firm's previous three (3) fiscal years, in excess of sixteen million six hundred thousand dollars (\$16,600,000). The commissioner may adjust this amount for inflation from time to time.

(d) A reference to a federal statute or regulation is a reference to the statute or regulation as in effect January 1, 2001. *(Indiana Department of Administration; 25 IAC 5-3-4)*

25 IAC 5-3-5 Ownership determinations

Authority: IC 4-13-1-4; IC 4-13-1-7; IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13-1; IC 4-13.5-1; IC 4-13.6; IC 5-22

Sec. 5. (a) In determining whether the socially disadvantaged participants in a firm own the firm, the department must consider all the facts in the record, viewed as a whole.

(b) To be an eligible MBE or WBE, a firm must be at least fifty-one percent (51%) owned by socially disadvantaged individuals. In the case of a:

- (1) corporation, such individuals must own at least fifty-one percent (51%) of each class of voting stock outstanding and fifty-one percent (51%) of the aggregate of all stock outstanding;**
- (2) partnership, fifty-one percent (51%) of each class of partnership interest must be owned by socially disadvantaged individuals, and such ownership must be reflected in the firm's partnership agreement; and**
- (3) limited liability company, at least fifty-one percent (51%) of each class of member interest must be owned by socially disadvantaged individuals.**

(c) The firm's ownership by socially disadvantaged individuals must be real, substantial, and continuing, going beyond pro forma ownership of the firm as reflected in ownership documents. The disadvantaged owners must enjoy the customary incidents of ownership, and share in the risks and profits commensurate with their ownership interests, as demonstrated by the substance, not merely the form, of arrangements.

(d) All securities that constitute ownership of a firm shall be held directly by disadvantaged persons. Except as provided in this subsection, no securities or assets held in trust, or by any guardian for a minor, are considered as held by disadvantaged persons in determining the ownership of a firm. However, securities or assets held in trust are regarded as held by a disadvantaged individual for purposes of determining ownership of the firm if either of the following apply:

- (1) The beneficial owner of securities or assets held in trust is a disadvantaged individual, and the trustee is the same or another such individual.**
- (2) The beneficial owner of a trust is a disadvantaged individual who, rather than the trustee, exercises effective control over the management, policymaking, and daily operational activities of the firm. Assets held in a revocable living trust may be counted only in the situation where the same disadvantaged individual is the sole grantor, beneficiary, and trustee.**

(e) The contributions of capital or expertise by the socially disadvantaged owners to acquire their ownership interests must be real and substantial. Examples of insufficient contributions include a promise to contribute capital, an unsecured note payable to the firm or an owner who is not a disadvantaged individual, or mere participation in a firm's activities as an employee. Debt instruments from financial institutions or other organizations that lend funds in the normal course of their business do not render a firm ineligible, even if the debtor's ownership interest is security for the loan.

(f) The following requirements apply to situations in which expertise is relied upon as part of a disadvantaged owner's contribution to acquire ownership:

- (1) The owner's expertise must be as follows:**
 - (A) In a specialized field.**
 - (B) Of outstanding quality.**
 - (C) In areas critical to the firm's operations.**
 - (D) Indispensable to the firm's potential success.**
 - (E) Specific to the type of work the firm performs.**
 - (F) Documented in the records of the firm. These records must clearly show the contribution of expertise and its value to the firm.**
- (2) The individual whose expertise is relied upon must have a significant financial investment in the firm.**

(g) The department must always deem as held by a socially disadvantaged individual, for purposes of determining ownership, all interests in a business or other assets obtained by the individual:

- (1) as the result of a final property settlement or court order in a divorce or legal separation, provided that no term or condition of the agreement or divorce decree is inconsistent with this section; or**
- (2) through inheritance, or otherwise because of the death of the former owner.**

(h) The following are requirements to determine ownership:

(1) The department must presume as not being held by a socially disadvantaged individual, for purposes of determining ownership, all interests in a business or other assets obtained by the individual as the result of a gift, or transfer without adequate consideration, from any nondisadvantaged individual or non-MBE or WBE firm who is:

- (A) involved in the same firm for which the individual is seeking certification, or an affiliate of that firm;**
- (B) involved in the same or a similar line of business; or**
- (C) engaged in an ongoing business relationship with the firm, or an affiliate of the firm, for which the individual is seeking certification.**

(2) To overcome this presumption and permit the interests or assets to be counted, the disadvantaged individual must demonstrate, by clear and convincing evidence, that:

- (A) the gift or transfer to the disadvantaged individual was made for reasons other than obtaining certification as a MBE or WBE; and**
- (B) the disadvantaged individual actually controls the management, policy, and operations of the firm, notwithstanding the continuing participation of a nondisadvantaged individual who provided the gift or transfer.**

(i) The department must apply the following rules in situations in which marital assets form a basis for ownership of a firm:

(1) When marital assets (other than the assets of the business in question), held jointly or as community property by both spouses, are used to acquire the ownership interest asserted by one spouse, the ownership interest in the firm must be deemed to have been acquired by that spouse with his or her own individual resources, provided that the other spouse irrevocably renounces and transfers all rights in the ownership interest in the manner sanctioned by the laws of the state in which either spouse or the firm is domiciled. The department may not count a greater portion of joint or community property assets toward ownership than state law would recognize as belonging to the socially disadvantaged owner of the applicant firm.

(2) A copy of the document legally transferring and renouncing the other spouse's rights in the jointly owned or community assets used to acquire an ownership interest in the firm must be included as part of the firm's application for MBE or WBE certification.

(3) The department must take into consideration financial implications of the transfer/renouncement. For example, if the renouncement is for rights to a home, the applicant shall provide documentation of the transfer with mortgage holder.

(j) The department will consider the following factors in determining the ownership of a firm, however, it must not regard a contribution of capital as failing to be real and substantial, or find a firm ineligible, solely because:

(1) A socially disadvantaged individual acquired his or her ownership interest as the result of a gift, or transfer without adequate consideration, other than the types set forth in subsection (h).

(2) There is a provision for the co-signature of a spouse who is not a socially disadvantaged individual on financing agreements, contracts for the purchase or sale of real or personal property, bank signature cards, or other documents.

(3) Ownership of the firm in question or its assets is transferred for adequate consideration from a spouse who is not a socially disadvantaged individual to a spouse who is such an individual. In this case, the department must give particularly close and careful scrutiny to the ownership and control of a firm to ensure that it is owned and controlled, in substance as well as in form, by a socially disadvantaged individual.

(k) The following are requirements for joint venture:

(1) A joint venture shall be eligible for the program when the MBE partner of the joint venture meets the standards in this section and the MBE shares in at least sixty percent (60%) of the ownership, control, management responsibilities, risks, and profits of the joint venture and when the MBE partner is responsible for a clearly defined portion of the work to be performed.

(2) In a case where a change of ownership or the death of an owner has occurred within the MBE or the MBE joint venture, the department shall reserve the right to review the new ownership structure to determine whether or not continued program eligibility is warranted. Therefore, the MBE or MBE joint venture partner shall notify the department within thirty (30) days of all ownership changes. Failure to submit this notification

may result in suspension of certification status.
(Indiana Department of Administration; 25 IAC 5-3-5)

25 IAC 5-3-6 Control determinations

Authority: IC 4-13-1-4; IC 4-13-1-7; IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13-1; IC 4-13.5-1; IC 4-13.6; IC 5-22

Sec. 6. (a) In determining whether socially disadvantaged owners control a firm, the department must consider all the facts in the record, viewed as a whole.

(b) Only an independent business may be certified as a MBE or WBE. An independent business is one the viability of which does not depend on its relationship with another firm or firms.

(1) In determining whether a potential MBE or WBE is an independent business, the department must scrutinize relationships with non-MBE or WBE firms, in such areas as personnel, facilities, equipment, financial and/or bonding support, and other resources.

(2) The department must consider whether present or recent employer/employee relationships between the disadvantaged owner of the potential MBE or WBE and non-MBE or WBE firms or persons associated with non-MBE or WBE firms compromise the independence of the potential MBE or WBE firm.

(3) The department must examine the firm's relationships with prime contractors to determine whether a pattern of exclusive or primary dealings with a prime contractor compromises the independence of the potential MBE or WBE firm.

(4) In considering factors related to the independence of a potential MBE or WBE firm, the department must consider the consistency of relationships between the potential MBE or WBE and non-MBE or WBE firms with normal industry practice.

(c) An MBE or WBE firm must not be subject to any formal or informal restrictions that limit the customary discretion of the socially disadvantaged owners. There can be no restrictions through corporate charter provisions, bylaw provisions, contracts, or any other formal or informal devices, for example, cumulative voting rights, voting powers attached to different classes of stock, employment contracts, requirements for concurrence by nondisadvantaged partners, conditions precedent or subsequent, executory agreements, voting trusts, or restrictions on or assignments of voting rights, that prevent the socially disadvantaged owners, without the cooperation or vote of any nondisadvantaged individual, from making any business decision of the firm. This subsection does not preclude a spousal co-signature on documents as provided for in this section.

(d) The socially disadvantaged owners must possess the power to direct or cause the direction of the management and policies of the firm and to make day-to-day as well as long term decisions on matters of management, policy, and operations.

(1) A disadvantaged owner must hold the highest officer position in the company, for example, chief executive officer or president.

(2) In a corporation, disadvantaged owners must control the board of directors.

(3) In a partnership, one (1) or more disadvantaged owners must serve as general partners, with control over all partnership decisions.

(e) Individuals who are not socially disadvantaged may be involved in an MBE or WBE firm as owners, managers, employees, stockholders, officers, and/or directors. Such individuals must not, however, possess or exercise the power to control the firm, or be disproportionately responsible for the operation of the firm.

(f) The socially disadvantaged owners of the firm may delegate various areas of the management, policymaking, or daily operations of the firm to other participants in the firm, regardless of whether these participants are socially disadvantaged individuals. Such delegations of authority must be revocable, and the socially disadvantaged owners must retain the power to hire and fire any person to whom such authority is delegated. The managerial role of the socially disadvantaged owners in the firm's overall affairs must be such that the department can reasonably conclude that the socially disadvantaged owners actually exercise control over the firm's operations, management, and policy.

(g) The socially disadvantaged owners must have an overall understanding of, and managerial and technical competence and experience directly related to, the type of business in which the firm is engaged and the firm's operations. The socially disadvantaged owners are not required to have experience or expertise in every critical area of the firm's operations, or to have greater experience or expertise in a given field than managers or key employees. The socially disadvantaged owners must have the ability to intelligently and critically evaluate information presented by other participants in the firm's activities and to use this information to make independent decisions concerning the firm's daily operations, management, and policymaking. Generally, expertise limited to office management, administration, or bookkeeping functions unrelated to the principal business activities of the firm is insufficient to demonstrate control.

(h) If state or local law requires the persons to have a particular license or other credential in order to own and/or control a certain type of firm, then the socially disadvantaged persons who own and control a potential MBE or WBE firm of that type must possess the required license or credential. If state or local law does not require such a person to have such a license or credential to own and/or control a firm, the department must not deny certification solely on the ground that the person lacks the license or credential. However, the department may take into account the absence of the license or credential as one (1) factor in determining whether the socially disadvantaged owners actually control the firm.

(i) The following are requirements for difference in remuneration:

(1) The department may consider differences in remuneration between the socially disadvantaged owners and other participants in the firm in determining whether to certify a firm as a MBE or WBE. Such consideration shall be in the context of the duties of the persons involved, normal industry practices, the firm's policy and practice concerning reinvestment of income, and any other explanations for the differences proffered by the firm. The department may determine that a firm is controlled by its socially disadvantaged owner although that owner's remuneration is lower than that of some other participants in the firm.

(2) In a case where a nondisadvantaged individual formerly controlled the firm, and a socially disadvantaged individual now controls it, the department may consider a difference between the remuneration of the former and current controller of the firm as a factor in determining who controls the firm, particularly when the nondisadvantaged individual remains involved with the firm and continues to receive greater compensation than the disadvantaged individual.

(j) In order to be viewed as controlling a firm, a socially disadvantaged owner cannot engage in outside employment or other business interests that conflict with the management of the firm or prevent the individual from devoting sufficient time and attention to the affairs of the firm to control its activities. For example, absentee ownership of a business and part-time work in a full-time firm are not viewed as constituting control. However, an individual could be viewed as controlling a part-time business that operates only on evenings and/or weekends, if the individual controls it all the time it is operating.

(k) The following are requirements concerning control of a firm:

(1) A socially disadvantaged individual may control a firm even though one (1) or more of the individual's immediate family members (who themselves are not socially disadvantaged individuals) participate in the firm as a manager, employee, owner, or in another capacity. Except as otherwise provided in this subsection, the department must make a judgment about the control the socially disadvantaged owner exercises vis-a-vis other persons involved in the business as it does in other situations, without regard to whether or not the other persons are immediate family members.

(2) If the department cannot determine that the socially disadvantaged owners, as distinct from the family as a whole, control the firm, then the socially disadvantaged owners have failed to carry their burden of proof concerning control, even though they may participate significantly in the firm's activities.

(l) Where a firm was formerly owned and/or controlled by a nondisadvantaged individual (whether or not an immediate family member), ownership and/or control were transferred to a socially disadvantaged individual, and the nondisadvantaged individual remains involved with the firm in any capacity, the disadvantaged individual now owning the firm must demonstrate, by clear and convincing evidence, the following:

(1) The transfer of ownership and/or control to the disadvantaged individual was made for reasons other than

obtaining certification as an MBE or WBE.

(2) The disadvantaged individual actually controls the management, policy, and operations of the firm, notwithstanding the continuing participation of a nondisadvantaged individual who formerly owned and/or controlled the firm.

(m) In determining whether a firm is controlled by its socially disadvantaged owners, the department may consider whether the firm owns equipment necessary to perform its work. However, the department must not determine that a firm is not controlled by socially disadvantaged individuals solely because the firm leases, rather than owns, such equipment, where leasing equipment is a normal industry practice and the lease does not involve a relationship with a prime contractor or other party that compromises the independence of the firm.

(n) The department must grant certification to a firm only for specific types of work in which the socially disadvantaged owners have the ability to control the firm. To become certified in an additional type of work, the firm must have been certified for at least six (6) months in its current type of work, or certified by the department for at least one (1) year, and demonstrate that its socially disadvantaged owners are able to control the firm with respect to the newly-requested type of work. The department may not, in this situation, require that the firm be recertified or submit a new application for certification, but it must verify the qualifying owner's control of the firm in the additional type of work. However, the department must apply the same standards to additional types of work that were applied originally. These additional work areas are not guaranteed simply because the firm is currently certified. Further, there is a presumption against having more than three (3) industry variations in the same business entity.

(o) A business operating under a franchise or license agreement may be certified if it meets the standards in this part and the franchiser or licensor is not affiliated with the franchisee or licensee. In determining whether affiliation exists, the department should generally not consider the restraints relating to standardized quality, advertising, accounting format, and other provisions imposed on the franchisee or licensee by the franchise agreement or license, provided that the franchisee or licensee has the right to profit from its efforts and bears the risk of loss commensurate with ownership. Alternatively, even though a franchisee or licensee may not be controlled by virtue of such provisions in the franchise agreement or license, affiliation could arise through other means, such as common management or excessive restrictions on the sale or transfer of the franchise interest or license.

(p) In order for a partnership to be controlled by qualified individuals, any nonqualifying partners must not have the power, without the specific written concurrence of the socially disadvantaged partner, to contractually bind the partnership or subject the partnership to contract or tort liability.

(q) The socially disadvantaged individuals controlling a firm may use an employee leasing company. The use of such a company does not preclude the socially disadvantaged individuals from controlling their firm if they continue to maintain an employer-employee relationship with the leased employees. This includes being responsible for hiring, firing, training, assigning, and otherwise controlling the on-the-job activities of the employees, as well as ultimate responsibility for wage and tax obligations related to the employees.

(r) There is a presumption against the ability to operate and control more than three (3) business entities within the context of this article. (*Indiana Department of Administration; 25 IAC 5-3-6*)

25 IAC 5-3-7 Other rules affecting certification

Authority: IC 4-13-1-4; IC 4-13-1-7; IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13-1; IC 4-13.5-1; IC 4-13.6; IC 5-22

Sec. 7. (a) Consideration of whether a firm performs a commercially useful function may be a consideration used by the department in making decisions about whether to certify a firm as a MBE or WBE.

(b) The department may consider, in making certification decisions, whether a firm has exhibited a pattern of conduct indicating its involvement in attempts to evade or subvert the intent or requirements of the MBE or

WBE program.

(c) The department must evaluate the eligibility of a firm on the basis of present circumstances. It must not refuse to certify a firm based solely on historical information indicating a lack of ownership or control of the firm by socially disadvantaged individuals at some time in the past, if the firm currently meets the ownership and control standards of this part. Nor must it refuse to certify a firm solely on the basis that it is a newly formed firm. Standards regarding newly formed firms can be found in subsection (j).

(d) MBE OR WBE firms and firms seeking MBE OR WBE certification shall cooperate fully with the department's requests for information relevant to the certification process. Failure or refusal to provide such information is a ground for a denial or removal of certification pursuant to 25 IAC 5-4.

(e) Firms organized for-profit or not-for-profit may be eligible MBE or WBEs. Certification standards regarding not-for-profit organizations are found in section 10 of this rule.

(f) An eligible MBE or WBE firm must be owned by individuals who are socially disadvantaged. Except as provided in this subsection, a firm that is not owned by such individuals, but instead is owned by another firm, even an MBE or WBE firm, cannot be an eligible MBE or WBE.

(1) If socially disadvantaged individuals own and control a firm through a parent or holding company, established for tax, capitalization, or other purposes consistent with industry practice, and the parent or holding company in turn owns and controls an operating subsidiary, the department may certify the subsidiary if it otherwise meets all requirements of this subdivision. In this situation, the individual owners and controllers of the parent or holding company are deemed to control the subsidiary through the parent or holding company.

(2) The department may certify such a subsidiary only if there is cumulatively fifty-one percent (51%) ownership of the subsidiary by qualifying individuals. The following examples illustrate how this cumulative ownership provision works:

(A) Qualifying individuals own one hundred percent (100%) of a holding company, which has a wholly-owned subsidiary. The subsidiary may be certified, if it meets all other requirements.

(B) Qualifying individuals own one hundred percent (100%) of the holding company, which owns fifty-one percent (51%) of a subsidiary. The subsidiary may be certified, if all other requirements are met.

(C) Qualifying individuals own eighty percent (80%) of the holding company, which in turn owns seventy percent (70%) of a subsidiary. In this case, the cumulative ownership of the subsidiary by qualifying individuals is fifty-six percent (56%) (eighty percent (80%) of the seventy percent (70%)). This is more than fifty-one percent (51%), so the department may certify the subsidiary, if all other requirements are met.

(D) Same as examples in clause (B) or (C), but someone other than the qualifying owners of the parent or holding company controls the subsidiary. Even though the subsidiary is owned by qualifying individuals, through the holding or parent company, the department cannot certify it because it fails to meet control requirements.

(E) Qualifying individuals own sixty percent (60%) of the holding company, which in turn owns fifty-one percent (51%) of a subsidiary. In this case, the cumulative ownership of the subsidiary by qualifying individuals is about thirty-one percent (31%). This is less than fifty-one percent (51%), so the department cannot certify the subsidiary.

(F) The holding company, in addition to the subsidiary seeking certification, owns several other companies. The combined gross receipts of the holding companies and its subsidiaries are greater than the size standard for the subsidiary seeking certification and/or the gross receipts cap of 13 CFR 121.402. Under the rules concerning affiliation, the subsidiary fails to meet the size standard and cannot be certified.

(g) Recognition of a business as a separate entity for tax or corporate purposes is not necessarily sufficient to demonstrate that a firm is an independent business, owned and controlled by socially disadvantaged individuals.

(h) The department must not require an MBE or WBE firm to be prequalified as a condition for certification. However, if the prequalification is industry/trade-specific, the department must require all firms that participate in its contracts and subcontracts related to that area to be prequalified.

(i) A firm that is owned by an Indian tribe, Alaska native corporation, or native Hawaiian organization as an entity, rather than by Indians, Alaska natives, or native Hawaiians as individuals, may be eligible for certification. Such a firm must meet the size standards of 13 CFR 121.402. Such a firm must be controlled by socially disadvantaged individuals, as provided in this article.

(j) The applicant must possess reasonable prospects for success in competing in the public sector. To do so, it must be in business in its selected areas of certification for at least two (2) full years immediately prior to the date of its application unless a waiver for this requirement is granted pursuant to subsection (b).

(1) Income tax returns for each of the two (2) previous tax years must show operating revenues in the selected types of work for which the applicant is seeking certification.

(2) The department may waive the two (2) years in business requirement if each of the following conditions are met:

(A) The socially disadvantaged individual or individuals upon whom eligibility is based have substantial business management experience.

(B) The socially disadvantaged applicant has demonstrated technical experience to carry out its business venture.

(C) The applicant has a record of successful performance on contracts from governmental or nongovernmental sources in its primary area of certification.

(D) The applicant has, or can demonstrate its ability to timely obtain, the personnel, facilities, equipment, and any other requirements needed to perform contracts.

(k) An applicant has an affirmative obligation to disclose any and all material and relevant information affecting a firm's certification. Any misrepresentation or omission made with respect to an application may be grounds for denial of the application.

(l) An applicant can submit a maximum of two (2) applications per year. At any time, only one (1) application can be pending. (*Indiana Department of Administration; 25 IAC 5-3-7*)

25 IAC 5-3-8 Rules affecting the certification process

Authority: IC 4-13-1-4; IC 4-13-1-7; IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13-1; IC 4-13.5-1; IC 4-13.6; IC 5-22

Sec. 8. (a) Certification process requirements are as follows:

(1) At a minimum, the Department must take the following steps in determining whether a firm meets the standards for certification as an MBE or WBE:

(A) The following for on-site visits:

(i) Make on-site visits to company headquarters with little or no advance notice in its efforts to make accurate judgments about the ownership and control of the subject MBE or WBE. The department must interview the principal officers of the firm and review their resumes and/or work histories. The department may also perform an on-site visit to job sites if there are such sites on which the firm is working at the time of the eligibility investigation in its jurisdiction or local area.

(ii) With regards to out-of-state firms, the department will rely upon the site visit report of other recognized governmental entities with respect to a firm applying for certification.

(B) If the firm is a corporation, analyze the ownership of stock in the firm.

(C) Analyze the bonding and financial capacity of the firm.

(D) Determine the work history of the firm, including contracts it has received and work it has completed.

(E) Obtain a statement from the firm of the type of work it prefers to perform as part of the MBE or WBE program and its preferred locations for performing the work, if any.

(F) Obtain or compile a list of the equipment owned by or available to the firm and the licenses the firm and its key personnel possess to perform the work it seeks to do as part of the program.

(G) Require potential firms to complete and submit an appropriate application form.

(2) The department must make sure that the applicant attests to the accuracy and truthfulness of the information on the application form. This shall be done either in the form of an affidavit sworn to by the applicant before a person who is authorized by state law to administer oaths or in the form of an unsworn

declaration executed under penalty of perjury of the laws of the United States.

(3) The department must review all information on the form prior to making a decision about the eligibility of the firm.

(4) The department must request, at any time that it deems necessary, further information or clarification of any claims or issues that may lend reasonable doubt to the legitimacy of the subject MBE or WBE.

(5) The department must conduct preliminary audits of accounting records, project files, and any legal documents that may be pertinent or relevant to the establishment of legitimacy of the subject MBE or WBE.

(6) The department must make recommendations to the appropriate agencies and departments based on the findings of all reviews, interviews, site visits, and audits regarding the qualifications and legitimacy of the subject MBE or WBE.

(7) Make recommendations to the appropriate agencies for further investigation if misrepresentation is suspected.

(8) The department must make decisions on applications for certification within ninety (90) days of the determination that the applicant firm has submitted all information required under this part. The department may extend this time period once, for no more than an additional sixty (60) days, upon written notice to the firm, explaining fully and specifically the reasons for the extension. Failure to make a decision by the applicable deadline under this paragraph is deemed a constructive denial of the application, on the basis of which the firm may appeal under 25 IAC 5-4.

(9) Other certification information, as provided in the department's certification manual.

(b) Applications from MBE or WBE firms domiciled outside of Indiana require the following, in addition to the items in this article:

(1) The firm must be currently certified and in good standing with a governmental entity in its home state.

(2) The home state shall provide the on-site interview that was conducted in association with the certification. Certification of out-of-state applicants by the department is conditional to the out-of-state applicant meeting the standards of certification set forth in this article. The department reserves the right to grant or deny certification to an MBE or WBE with current, in-place certification status with other governmental agencies and departments with recognized certification authority.

(c) Confidentiality requirements are as follows:

(1) The department must safeguard from disclosure to unauthorized persons information gathered as part of the certification process that may reasonably be regarded as proprietary or other confidential business information, consistent with applicable federal, state, and local law.

(2) If a vendor wishes to be certified by another certification entity, the vendor will be required to submit a written notice advising the office of the same. The office will then respond to requests for certification information from the previously identified agencies. The information that will be available will include application materials and the report of a site visit, upon request. Transmission of financial data must be specifically requested. The department will respond to two (2) requests at no charge to the vendor. However, the department cannot bear the expense of additional copies, and will assess a fee of ten cents (\$0.10) per copy plus postage for the information being forwarded.

(d) Once the department has certified an MBE or WBE, the firm shall remain certified for a period of at least three years unless and/or until its certification has been removed through the procedures of 25 IAC 5-4. The department may not require firms to reapply for certification as a condition of continuing to participate in the program during this three (3) year period unless the factual basis on which the certification was made changes. (*Indiana Department of Administration; 25 IAC 5-3-8*)

25 IAC 5-3-9 Rules affecting the firm's responsibility after being certified

Authority: IC 4-13-1-4; IC 4-13-1-7; IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13-1; IC 4-13.5-1; IC 4-13.6; IC 5-22

Sec. 9. (a) Firm's responsibilities after certification include, but may not be limited to this section.

(b) A certified firm must inform the department in writing of any change in circumstances affecting its ability

to meet size, disadvantaged status, ownership, or control requirements of this part or any material change in the information provided in the application form.

- (1) Changes in contact information must be reported, including address, telephone number, and personnel.
- (2) Management responsibility among members of a limited liability company are covered by this requirement.
- (3) Supporting documentation must be attached describing in detail the nature of such changes.
- (4) The notice must take the form of an affidavit sworn to by the applicant before a person who is authorized by state law to administer oaths or of an unsworn declaration executed under penalty of perjury of the laws of the United States. Written notification must be provided within thirty (30) days of the occurrence of the change. Failure to make timely notification of such a change will be deemed to be failure to cooperate under section 7(d) of this rule.

(c) A certified firm must provide, every year on the anniversary of the date of its certification, an affidavit sworn to by the firm's owners before a person who is authorized by state law to administer oaths or an unsworn declaration executed under penalty of perjury of the laws of the United States. This affidavit must affirm that there have been no changes in the firm's circumstances affecting its ability to meet size, disadvantaged status, ownership, or control requirements of this subsection or any material changes in the information provided in its application form, except for changes about which the firm has notified the department under subsection (b). The affidavit shall specifically affirm that the firm continues to meet Small Business Administration business size criteria and the overall gross receipts cap of this subsection, documenting this affirmation with supporting documentation of the firm's size and gross receipts. Failure to provide this affidavit in a timely manner will be deemed to have failed to cooperate under section 7(d) of this rule. (*Indiana Department of Administration; 25 IAC 5-3-9*)

25 IAC 5-3-10 Certification of not-for-profit organizations

Authority: IC 4-13-1-4; IC 4-13-1-7; IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13-1; IC 4-13.5-1; IC 4-13.6; IC 5-22

Sec. 10. Firms that are established as not-for-profit organizations may be certified as MBE and/or WBE firms. The standards for certification of the firm as the same as those set forth in this section, with the following exceptions:

- (1) The applicant will be the highest ranking official working in the firm on a day-to-day basis.
- (2) Business size will be waived.

(*Indiana Department of Administration; 25 IAC 5-3-10*)

Rule 4. Certification Denials and Challenges

25 IAC 5-4-1 General provisions

Authority: IC 4-13-1-4; IC 4-13-1-7; IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13-1; IC 4-13.5-1; IC 4-13.6; IC 4-21.5-3-5; IC 5-22

Sec. 1. (a) This rule applies to the following situations:

- (1) A firm whose application for certification as a minority or women's business enterprise has been denied.
- (2) A complaint has been issued to a challenged enterprise concerning the possible revocation of its certification.
- (3) A firm whose challenge to the certification of a minority or women's business enterprise has been denied.

(b) As used in this rule, "petitioner" means the person whose application for certification as a minority or women's business enterprise has been denied, or whose challenge to the certification of a minority or women's business enterprise has been denied.

(c) An action involving a denial of a certification or challenge to a certification under this rule shall also comply with IC 4-21.5-3.

(d) All proceedings under this section are deemed to be a determination of status as defined by IC 4-21.5-3-5.

(e) All certification determinations issued pursuant to proceeding under this section shall be deemed advisory or recommended orders.

(f) The ultimate authority under this article as defined by IC 4-21.5-3 is the commissioner of the department.

(g) Procedural matters regarding hearings under this section shall comply with section 5 of this rule.

(h) Notwithstanding any provision to the contrary contained in this article, the department reserves the right to deny certification to out-of-state firms if their home state does not afford certification for Indiana firms. (*Indiana Department of Administration; 25 IAC 5-4-1*)

25 IAC 5-4-2 Department's denials of initial requests for certification

Authority: IC 4-13-1-4; IC 4-13-1-7; IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13-1; IC 4-13.5-1; IC 4-13.6; IC 4-21.5-3-7; IC 5-22

Sec. 2. (a) When the department denies a request by a firm, which is not currently certified, to be certified, the department must provide the firm a written explanation of the reasons for the denial, specifically referencing the evidence in the record that supports each reason for the denial. All documents and other information on which the denial is based must be made available to the applicant, on request.

(b) When a firm is denied certification, it cannot reapply for certification for twelve (12) months. The time period for reapplication begins to run on the later of the following events:

- (1) On the date the explanation required by subsection (a) is received by the firm.
- (2) Final order issued by the ultimate authority.

(c) A person who has been denied certification as a minority or women's business enterprise may request a hearing under IC 4-21.5-3-7.

(d) Requests for hearings must be submitted within fifteen (15) days after service of notice of denial of the certification or the challenge to a certification in accordance with IC 4-21.5-3.

(e) If a firm withdraws its application prior to notice of denial of certification, the firm may not reapply for six (6) months from the date the notice of withdrawal of application is received by the department. (*Indiana Department of Administration; 25 IAC 5-4-2*)

25 IAC 5-4-3 Department's removal of a firm's eligibility

Authority: IC 4-13-1-4; IC 4-13-1-7; IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13-1; IC 4-13.5-1; IC 4-13.6; IC 5-22

Sec. 3. (a) This section establishes standards for processing a complaint issued to a challenged enterprise concerning the possible revocation of its certification.

(b) Requirements for ineligibility complaints are as follows:

- (1) Any person may file with the department a written complaint alleging that a currently certified firm is ineligible and specifying the alleged reasons why the firm is ineligible. The department is not required to accept a general allegation that a firm is ineligible or an anonymous complaint. The complaint may include any information or arguments supporting the complainant's assertion that the firm is ineligible and should not continue to be certified.
- (2) The department must review its records concerning the firm, any material provided by the firm and the complainant, and other available information. The department may request additional information from the firm or conduct any other investigation that you deem necessary.
- (3) If the department determines, based on this review, that there is reasonable cause to believe that the firm is ineligible, the department must provide written notice to the firm that it proposes to find the firm ineligible, setting forth the reasons for the proposed determination. If the department determines that such reasonable cause does not exist, it must notify the complainant and the firm in writing of this determination and the

reasons for it. All statements of reasons for findings on the issue of reasonable cause must specifically reference the evidence in the record on which each reason is based.

(c) If, based on notification by the firm of a change in its circumstances or other information that comes to the attention of the department that there is reasonable cause to believe that a currently certified firm is ineligible, the department must provide written notice to the firm that it proposes to find the firm ineligible, setting forth the reasons for the proposed determination. The statement of reasons for the finding of reasonable cause must specifically reference the evidence in the record on which each reason is based.

(d) Requirements for complaints from other state agencies are as follows:

(1) If a concerned state agency determines that information in your certification records, or other information available to that agency, provides reasonable cause to believe that a certified firm does not meet the eligibility criteria of this subsection, the concerned state agency may request that the department initiate a proceeding to remove the firm's certification.

(2) The concerned state agency must provide the department any relevant documentation or other information.

(e) When the department notifies a firm that there is reasonable cause to remove its eligibility, as provided in subsection (a), (b), or (c), the department must give the firm an opportunity for a hearing, at which the firm may respond to the reasons for the proposal to remove its eligibility in person and provide information and arguments concerning why it should remain certified.

(f) The firm may elect to present information and arguments, in writing, without going to a hearing. In such a situation, the department bears the burden of proving that the firm does not meet the certification standards by a preponderance of the evidence, as you would during a hearing.

(g) Hearing requirements are as follows:

(1) In such a proceeding, the department bears the burden of proving, by a preponderance of the evidence, that the firm does not meet the certification standards of this rule.

(2) The department must maintain a complete record of the hearing, by any means acceptable under state law for the retention of a verbatim record of an administrative hearing. You must retain the original record of the hearing. You may charge the firm only for the cost of copying the record.

(h) For separation of functions, you must ensure that the decision in a proceeding to remove a firm's eligibility is made by an office and personnel that did not take part in actions leading to or seeking to implement the proposal to remove the firm's eligibility and are not subject, with respect to the matter, to direction from the office or personnel who did take part in these actions.

(i) The department must not base a decision to remove eligibility on a reinterpretation or changed opinion of information available to the department at the time of its certification of the firm. It may base such a decision only on one (1) or more of the following:

(1) Changes in the firm's circumstances since the certification of the firm by the department that render the firm unable to meet the eligibility standards of this rule.

(2) Information or evidence not available to the department at the time the firm was certified.

(3) Information that was concealed or misrepresented by the firm in previous certification actions by a department.

(4) A change in the certification standards or requirements since the firm was certified.

(5) A documented finding that the department's determination to certify the firm was factually erroneous.

(j) Requirements for status of firms during proceedings are as follows:

(1) A firm remains an eligible MBE or WBE status during the pendency of the department's proceeding to remove its eligibility.

(2) The firm does not become ineligible until a notice revoking certification is issued by the commissioner of the department.

(k) When you remove a firm's eligibility, you must take the following action:

(1) When a prime contractor has made a commitment to using the ineligible firm, or there has been made a commitment to use the firm as a prime contractor, but a subcontract or contract has not been executed before the decertification notice provided for in subsection (j) has been issued, the ineligible firm does not count toward the contract goal or overall goal. The prime contractor is to meet the contract goal with an eligible firm or demonstrate that it has made a good faith effort to do so.

(2) If a prime contractor has executed a subcontract with the firm before the department has notified the firm of its ineligibility, the prime contractor may continue to use the firm on the contract and may continue to receive credit toward its goal for the firm's work. In this case, or in a case where a prime contract has been awarded to a firm that was later ruled ineligible, the portion of the ineligible firm's performance of the contract remaining after the notice of its ineligibility shall not count toward the overall goal, but may count toward the contract goal.

(3) If the firm's ineligibility is caused solely by its having exceeded the size standard during the performance of the contract, the department will count its participation on that contract toward overall and contract goals.

(Indiana Department of Administration; 25 IAC 5-4-3)

25 IAC 5-4-4 Procedures when a challenge is not accepted

Authority: IC 4-13-1-4; IC 4-13-1-7; IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13-1; IC 4-13.5-1; IC 4-13.6; IC 4-21.5-3-7; IC 5-22

Sec. 4. (a) If you are a complainant in an ineligibility complaint to the department, you may appeal if the department does not find reasonable cause to propose removing a firm's eligibility or, following a removal of eligibility proceeding, determines that the firm is eligible.

(b) A complainant may request a hearing under IC 4-21.5-3-7. Requests for hearings must be submitted within fifteen (15) days after service of notice of denial of the certification or the challenge to a certification in accordance with IC 4-21.5-3. *(Indiana Department of Administration; 25 IAC 5-4-4)*

25 IAC 5-4-5 Procedural issues

Authority: IC 4-13-1-4; IC 4-13-1-7; IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13-1; IC 4-13.5-1; IC 4-13.6; IC 4-21.5-3; IC 5-22

Sec. 5. Procedural matters are not addressed in this title shall be governed by the Indiana rules of trial procedure. The following procedural matters shall comply with IC 4-21.5-3:

(1) Appearances and service.

(2) Discovery.

(3) Subpoenas.

(4) Prehearing.

(5) Motions for summary judgment and other appropriate motions.

(6) Depositions.

(7) Continuances.

(8) Evidence.

(9) Matters concerning ex parte communication.

(10) Matters concerning sanctions and penalties.

(11) Transmittal of the record and recommendation to the ultimate authority shall comply with IC 4-21.5-3.

(12) A petitioner must afford the department an opportunity to investigate and verify information or documents that the petitioner intends to offer in support of his or her case. The petitioner shall not be permitted to introduce into evidence any information or documents that the department has not been afforded the opportunity to investigate and verify.

(Indiana Department of Administration; 25 IAC 5-4-5)

25 IAC 5-4-6 Proceedings

Authority: IC 4-33-4-1; IC 4-33-4-2; IC 4-33-4-3

Affected: IC 4-21.5; IC 4-33

Sec. 6. (a) The burden of proof shall at all times be on the petitioner in either of the following situations:

(1) The petitioner is appealing the denial of an application for certification under this rule.

(2) The petitioner is appealing the denial of a challenge to a minority or women's business enterprise certification under this rule.

The petitioner shall have the affirmative responsibility of establishing by a preponderance of the evidence that the application for certification should not have been denied or that the challenge to a certification should not have been denied.

(b) The burden of proof shall at all times be on the department if the department has filed a complaint indicating the department seeks to revoke a challenged enterprise's certification. The department shall have the affirmative responsibility of establishing by a preponderance of the evidence that the challenged enterprise does not meet the requirements of the act and this title for certification as a minority or women's business enterprise.

(c) Any testimony shall be given under oath or affirmation. The administrative law judge shall be authorized to administer oaths.

(d) Both parties may present an opening statement on the merits. The party who bears the burden of proof proceeds first. The party not bearing the burden of proof may not reserve opening statement for a later time. The administrative law judge may determine the length of time each party is permitted for the presentation of an opening statement.

(e) The party bearing the burden of proof shall then present its case-in-chief.

(f) Upon the conclusion of the case-in-chief presented by the party bearing the burden of proof, the other party may move for a directed finding. The administrative law judge may hear arguments on the motion or may grant, deny, or reserve any decision thereon, with or without argument.

(g) If no motion for directed finding is made, or if such motion is denied or decision reserved thereon, the party not bearing the burden of proof may present its case.

(h) Each party may conduct cross-examination of adverse witnesses.

(i) Upon conclusion of the case of the party not bearing the burden of proof, the party bearing the burden of proof may present evidence in rebuttal.

(j) The administrative law judge may ask questions of the witnesses and may request or allow additional evidence at any time, including additional rebuttal evidence.

(k) Both parties may present closing argument. The party bearing the burden of proof proceeds first, and, thereafter, the opposing party. The party bearing the burden of proof may present rebuttal argument. The administrative law judge may determine the length of time each party is permitted for the presentation of closing argument.

(l) The administrative law judge may require or allow the parties to submit posthearing briefs, proposed findings of fact, and conclusions of law within ten (10) days of the conclusion of the hearing or within such other time period the administrative law judge might order.

(m) Notwithstanding any other provision in this article to the contrary, evidence presented at any hearing or review conducted under this article shall be confined to the information available to the department at the time its decision was issued. (*Indiana Department of Administration; 25 IAC 5-4-6*)

Rule 5. MBE/WBE Participation in Procurement and Contracting; Prime Contractors

25 IAC 5-5-1 Policy; procurement and contracting

Authority: IC 4-13-1-4; IC 4-13-1-7; IC 4-13-2-9; IC 4-13.6-3-1
Affected: IC 4-13-1; IC 4-13.5-1; IC 4-13.6; IC 5-22

Sec. 1. It is the policy of the state to provide an equal opportunity for minority and women's business enterprises to participate in the state's procurement and contracting processes as prime contractors. (*Indiana Department of Administration; 25 IAC 5-5-1*)

25 IAC 5-5-2 Activities to achieve participation

Authority: IC 4-13-1-4; IC 4-13-1-7; IC 4-13-2-9; IC 4-13.6-3-1
Affected: IC 4-13-1; IC 4-13.5-1; IC 4-13.6; IC 5-22

Sec. 2. The department shall perform activities to provide minority and women's business enterprises the opportunity to participate in the state's award of purchases and contracts. (*Indiana Department of Administration; 25 IAC 5-5-2*)

25 IAC 5-5-3 Outreach and assessment

Authority: IC 4-13-1-4; IC 4-13-1-7; IC 4-13-2-9; IC 4-13.6-3-1
Affected: IC 4-13-1; IC 4-13.5-1; IC 4-13.6; IC 5-22

Sec. 3. (a) The department shall perform activities to outreach to minority and women's business enterprises. The department shall assess where and when the programs are most valuable to these enterprises.

(b) The department shall provide information on qualifications necessary for firms to compete for bid opportunities. (*Indiana Department of Administration; 25 IAC 5-5-3*)

25 IAC 5-5-4 Promoting MBE/WBE participation as prime contractors

Authority: IC 4-13-1-4; IC 4-13-1-7; IC 4-13-2-9; IC 4-13.6-3-1
Affected: IC 4-13-1; IC 4-13.5-1; IC 4-13.6; IC 5-22

Sec. 4. The department shall provide and promote opportunities for minorities and women to participate in procurement and contracting opportunities as prime vendors. (*Indiana Department of Administration; 25 IAC 5-5-4*)

25 IAC 5-5-5 Monitoring MBE/WBE participation as prime contractors

Authority: IC 4-13-1-4; IC 4-13-1-7; IC 4-13-2-9; IC 4-13.6-3-1
Affected: IC 4-13-1; IC 4-13.5-1; IC 4-13.6; IC 5-22

Sec. 5. (a) In monitoring MBE/WBE participation in prime contract awards, the department shall do the following as it pertains to nonadvertised procurements and contracting bids:

- (1) Establish a standard method to record solicitations of these procurements.
- (2) The form for such recording should include, but not be limited to, the following:
 - (A) Information on the contractors contacted, including name, address, telephone number, fax, and e-mail.
 - (B) The contractors' ethnicity and gender.
 - (C) Whether or not the contractor is a small business.
 - (D) Whether or not the contractor is new to the state's procurement process.
 - (E) The contractor's bid amount (or that the contractor chose not to bid).
 - (F) The person completing the form.
 - (G) The personnel responsible for the solicitation.

(b) To monitor MBE/WBE participation in prime contract awards, the department shall do the following as it pertains to contracts other than nonadvertised procurements and contracting bids:

- (1) Monitor the lists of firms bidding to develop potential strategies to increase the number of bidders. The form for such recording should include, but not be limited to, the following:
 - (A) Information on the contractors, including name, address, telephone number, fax, and e-mail.
 - (B) The contractors' ethnicity and gender.
 - (C) The reason or reasons the company has chosen not to bid.
- (2) Establish a system to debrief bidders who do not win state contracts. The method of debriefing may include

one (1) or more of the following:

(A) Provide feedback to MBE/WBE bidders and/or small firms, in general, to ensure they are aware of the availability of information regarding bid tabulations.

(B) Work with small business assistance organizations to counsel MBE/WBE bidders and/or small firms, in general, on strengthening future proposals and/or understanding of state requirements.

(3) Maintain a list of bidders, consisting of information regarding all firms that bid or quote contracts. This list shall be used to compile and track those firms who have shown an interest in participating in the state's procurement and contracting processes. The information to be compiled shall include, but may not be limited to, the following:

(A) Company name, address, phone number, fax, and e-mail.

(B) Owner's name, gender, and ethnicity.

(C) If new to the state bid process, age of firm and gross annual receipts.

(D) For this bid, name of proposed subcontractors proposed, including, for each company, the company's name, owner's name, gender, and ethnicity.

(Indiana Department of Administration; 25 IAC 5-5-5)

25 IAC 5-5-6 Reporting MBE/WBE participation as prime contractors

Authority: IC 4-13-1-4; IC 4-13-1-7; IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13-1; IC 4-13-16.5-1; IC 4-13.5-1; IC 4-13.6; IC 5-22

Sec. 6. All state agencies, as defined in IC 4-13-16.5-1, shall report to the department its award of prime contracts to MBEs and WBEs on a quarterly basis. The form of the report shall be in compliance with policies and procedures of the department. *(Indiana Department of Administration; 25 IAC 5-5-6)*

Rule 6. MBE/WBE Participation in Procurement and Contracting; Subcontractors

25 IAC 5-6-1 Promoting MBE/WBE participation as subcontractors

Authority: IC 4-13-1-4; IC 4-13-1-7; IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13-1; IC 4-13.5-1; IC 4-13.6; IC 5-22

Sec. 1. The department shall provide and promote opportunities for minorities and women to participate in procurement and contracting opportunities as subcontractors. *(Indiana Department of Administration; 25 IAC 5-6-1)*

25 IAC 5-6-2 Monitoring MBE/WBE participation as subcontractors

Authority: IC 4-13-1-4; IC 4-13-1-7; IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13-1; IC 4-13.5-1; IC 4-13.6; IC 5-22

Sec. 2. (a) In monitoring MBE/WBE participation as subcontractors, the department shall conduct pre-project meetings with all subcontractors and prime contractors. The department shall determine which projects will require a pre-project meeting. Items of discussion at the meeting shall include, but may not be limited to, the following:

(1) Subcontractors will learn when their services are likely to be needed.

(2) The department will explain the state's prompt payment program.

(3) The department will provide a review of MBE/WBE program requirements.

(4) The department will explain the state's nondiscrimination and antidiscrimination laws.

(b) Require prime contractors to include an explanation for how MBEs and WBEs will be used with all amendments and/or change order requests, and the percentage represented above the current contract amount.

(c) Notify subcontractors when contracts are revised upward through amendments and/or change orders.

(d) All prime contractors, including MBE and WBE prime contractors, must meet the contract goals through use of subcontractors. MBE and WBE prime contractors will get no credit toward the contract goal for the use of their own workforce. *(Indiana Department of Administration; 25 IAC 5-6-2)*

25 IAC 5-6-3 Reporting MBE/WBE participation as subcontractors

Authority: IC 4-13-1-4; IC 4-13-1-7; IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13-1; IC 4-13.5-1; IC 4-13.6; IC 5-22

Sec. 3. In addition to requirements mentioned in other areas of the part, prime contractors shall be required to report all subcontractor participation, that is, MBE/WBE subcontractors and non-MBE/WBE subcontractors. The report shall include, but may not be limited to, the following:

- (1) Company name, address, telephone number, fax, and e-mail.
- (2) Owner's name, gender, and ethnicity.
- (3) Name of contact person employed by the firm.
- (4) Work the firm will perform and the approximate date when the subcontractors' work will commence (individually).
- (5) Contract amount for services to be performed (individually).

(Indiana Department of Administration; 25 IAC 5-6-3)

25 IAC 5-6-4 Procedure for subcontractor bid submission

Authority: IC 4-13-1-4; IC 4-13-1-7; IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13-1; IC 4-13.5-1; IC 4-13.6; IC 5-22

Sec. 4. (a) In a case where the bidder has arranged to subcontract one hundred percent (100%) or more of the subcontractor goal to MBEs and WBEs, a completed MBE/WBE subcontractor plan shall be submitted, along with the other required bid documents, as prescribed.

- (1) All MBE and WBE subcontractors must be validated by the department prior to the award of the contract. The completed plan shall include the following information:

- (A) Name of the firm to be employed.
- (B) Phone number of the firm.
- (C) Name of a contact person from the firm.
- (D) Work the firm will perform and the approximate date when the MBEs work will commence.
- (E) Contract amount for services that will be performed.

- (2) In a case where the bidder has had the MBE/WBE subcontractor plan approved, where that bidder has been awarded the contract, and where the awarded contract is one hundred thousand dollars (\$100,000) or more, the bidder shall submit participation reports monthly, or at more frequent intervals, as may be requested.

- (3) The department reserves the right to periodically require progress reports from the contractor on projects under one hundred thousand dollars (\$100,000) regarding continuing MBE and WBE participation.

(b) Purchases from MBE suppliers are allowed for MBE credit in the program. The maximum allowable credit will be limited to sixty percent (60%) of the total project goal. The supplier must perform a commercially useful function.

(c) In a case where the bidder has been unable to arrange to subcontract one hundred percent (100%) of the subcontract goal, but has been able to arrange to subcontract some of the goal to MBEs and/or WBEs, both a completed MBE/WBE subcontractor plan and a completed application for MBE/WBE program waiver shall be submitted with the other required bid documents, as prescribed. All MBE and WBE subcontractors must be validated by the department prior to the award of the contract. All forms are to be completed as described in subsection (a).

(d) In a case where the bidder has been unable to arrange to subcontract the goal percentage or in a case where no MBE or WBE participation is expected to occur, a completed application for MBE/WBE program waiver shall be submitted, along with the other required bid documents, as prescribed. The application shall be used to demonstrate the bidder's efforts to employ MBEs and WBEs on the project. The application shall include the following information:

- (1) Names of the MBE and WBE firms that the bidder has contacted or been contacted by.
- (2) Persons working at the firms who were contacted.
- (3) Phone numbers of the firms.

- (4) Types of contacts or communications.
 - (5) An explanation of the results obtained, such as price not competitive, unable to contact, or no response.
- The state reserves the right to verify and seek further clarification of any information submitted.

(e) Compliance with this rule is considered to be a demonstration of the bidder's responsiveness and responsibility. Therefore, all statements shall be complete, legible, true, and correct and shall not omit material facts. Failure to provide complete and accurate MBE and WBE subcontractor plans using minority and women's business enterprises validated as MBEs and WBEs by the department, or failure to provide applications for MBE/WBE program waivers, or both, may be the basis for rejection of the bid. *(Indiana Department of Administration; 25 IAC 5-6-4)*

Rule 7. Compliance

25 IAC 5-7-1 Policy

Authority: IC 4-13-1-4; IC 4-13-1-7; IC 4-13-2-9; IC 4-13.6-3-1
Affected: IC 4-13-1; IC 4-13-16.5-1; IC 4-13.5-1; IC 4-13.6; IC 5-22

Sec. 1. (a) The results of a study, a Statistical Analysis of Utilization, conducted in accordance with IC 4-13-16.5-1, will determine the availability of socially disadvantaged small, minority, and women's business enterprises in the marketplace.

(b) Should the study find statistically significant disparities in state contractual expenditures in specifically defined areas, as compared to the ready, willing, and able minority and women's business enterprises in the state, the department shall institute goals for procurement and contracting to remedy the disparate findings of the study. *(Indiana Department of Administration; 25 IAC 5-7-1)*

25 IAC 5-7-2 Parties to whom this rule applies

Authority: IC 4-13-1-4; IC 4-13-1-7; IC 4-13-2-9; IC 4-13.6-3-1
Affected: IC 4-13-1; IC 4-13-16.5-1; IC 4-13.5-1; IC 4-13.6; IC 5-22

Sec. 2. (a) This rule applies to all state agencies as defined in IC 4-13-16.5-1.

(b) This rule does not apply to either of the following:

- (1) The state lottery commission or the Indiana gaming commission with respect to setting and enforcing goals for awarding contracts to minority and women's business enterprises.
- (2) Other state agencies whose purchases and contracts were not addressed in the most current Statistical Analysis of Utilization.

However, these agencies shall provide reports to the department of MBE and WBE procurement and contracting. This information shall be incorporated as data for the next study. The agency shall not be exempt from that point forward. *(Indiana Department of Administration; 25 IAC 5-7-2)*

25 IAC 5-7-3 Goal setting

Authority: IC 4-13-1-4; IC 4-13-1-7; IC 4-13-2-9; IC 4-13.6-3-1
Affected: IC 4-13-1; IC 4-13-16.5-1; IC 4-13.5-1; IC 4-13.6; IC 5-22

Sec. 3. (a) The goal setting shall be subject to the following provisions:

- (1) The goals shall be updated annually, during the month of March, to go into effect July 1 of the same year.
- (2) The goals shall reflect current utilization and availability.
- (3) The goals will apply to procurements and contracts as awarded, and to change orders, amendments, and other modifications to the contract which affect contract value.
- (4) In accordance with IC 4-13-16.5-1, the findings of discrimination shall be updated, and the continuance of the goals shall be subject to the results of that review.

(b) The department may set overall MBE and WBE goals, which may be met through the use of prime contractors, subcontractors, suppliers, joint ventures, or other arrangements that afford meaningful

opportunities for MBE and WBE participation.

(c) The department may set specific MBE and WBE goals in the areas of construction, professional services, suppliers, and other business services based on the disparate findings of the Statistical Analysis of Utilization.

(d) Goals set by the department shall incorporate the availability of MBEs and WBEs to perform the work, and the availability of MBEs and WBEs in the location where the work is to be done.

(e) Subgoals may be set, wherein specific race and gender goals are set, incorporating the findings of the study, and in accordance with applicable laws.

(f) Goals may vary on individual contracts. However, the combined participation shall represent the MBE and WBE participation for the year. (*Indiana Department of Administration; 25 IAC 5-7-3*)

25 IAC 5-7-4 Compliance monitoring

Authority: IC 4-13-1-4; IC 4-13-1-7; IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13-1; IC 4-13.5-1; IC 4-13.6; IC 5-22

Sec. 4. (a) In the management of this program, the department shall exercise its rights to employ all available administrative actions and remedies to ensure that the goals and intent of the program are successfully met. Therefore, the department shall serve as the final authority in the authentication, acceptance, and certification of MBE and WBE firms according to the criteria established in this article.

(b) The final authority in the review, acceptance, and approval of all MBE and WBE affidavits and subcontractor plans, and applications for MBE/WBE program waivers which are included in bid packages. In the performance of these duties, the department is hereby empowered to perform functions, including, but not limited to, the following:

(1) Review all MBE and WBE affidavits and subcontractor plans, and applications for MBE/WBE program waivers, after the bid opening and before the award of the contract, in order to verify the authenticity of the documents and the successful bidder's adherence to the rules and regulations set forth in the contract documents.

(2) Contact and interview the successful bidder or its listed subcontractors and material suppliers if further information is required to establish authenticity and to issue approval of the submitted documentation.

(3) Conduct audits, as necessary, of the accounting records of the successful bidder and the MBE and WBE participants to determine and establish their authenticity for the final acceptance and approval of the documentation.

(4) Issue an official NOTICE OF REJECTION when it has been determined that the successful bidder has not complied with the instructions set forth in the contract documents and this rule. The department may direct the successful bidder to submit revised documentation within five (5) working days or file for an official application for MBE/WBE program waiver. The department shall reserve the right to reject any and all bids when the successful bidder fails to respond to the department's request.

(5) Issue an official NOTICE OF CONDITIONAL APPROVAL when the following has been determined:

(A) That the successful bidder has demonstrated a good faith effort towards compliance to the program, but when one (1) or more of the MBE and/or WBE firms listed does not conform to the guidelines of this article.

(B) When the levels of participation do not reach the goal of the project.

After a review of the situation and circumstances, the successful bidder may be directed to submit a revised MBE or WBE subcontractor plan or may be granted an official MBE/WBE program waiver, thereby, allowing an exception to the goal for the project or any portion thereof.

(6) Issue an official approval of the MBE or WBE subcontractor plan when it has been determined that the successful bidder has achieved compliance with the project goal.

(7) Issue an official MBE/WBE program waiver from all or part of the project goal when it has been determined that the successful bidder has employed a good faith effort towards compliance to the program and when it has been determined that the realization of the project goal will not be feasible because of circumstances which are beyond the control of the bidder.

(8) Make recommendations to the appropriate agencies for further investigation if misrepresentation is suspected.

(c) The final authority in the review and acceptance of the successful bidder's MBE and WBE program participation reports that must be submitted under section 6 of this rule. Therefore, the department reserves the right to do the following:

- (1) Receive copies, on a timely basis or upon demand, of all reports for the expressed purpose of their review, acceptance, or rejection. Timeliness of submittal, accuracy, and completeness will be subject to close scrutiny in the execution of this process.
- (2) Conduct interviews with the appropriate personnel or designated representatives from the firms, as necessary, to determine and establish authenticity for acceptance of the reports.
- (3) Conduct audits of the accounting records of the firms to determine accuracy in reporting and to establish authenticity for acceptance of the reports.
- (4) Direct the successful bidder and the MBE and WBE participants, or all, to provide, as necessary, additional documentation to establish authenticity for acceptance of the reports.
- (5) Make recommendations to the appropriate agencies for further investigation if misrepresentation is suspected.

(d) Because the attainment of the project goal has been established through contractual provisions with the prime contractor, the department shall consider the prime contractor to be the sole source of responsibility for goal attainment and project administration and shall, therefore, be held accountable for the actions of all of its subcontractors, including those subcontractors who have subcontracted work to MBE and WBE contractors or who have purchased materials from MBE and WBE suppliers.

(e) The department may employ its authority to make determinations of responsiveness and responsibility based on the actions of the subcontractors regarding adherence to Indiana laws and rules. (*Indiana Department of Administration; 25 IAC 5-7-4*)

25 IAC 5-7-5 Application for relief from project goal

Authority: IC 4-13-1-4; IC 4-13-1-7; IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13-1; IC 4-13.5-1; IC 4-13.6; IC 5-22

Sec. 5. (a) In cases where the contractor is unable to meet the project goal, the contractor may petition the department for relief from that goal by filing an application for MBE/WBE program waiver. The application for MBE/WBE program waiver shall show all reasonable good faith efforts that were made by the contractor for the purpose of fulfilling the project goal. Such reasonable efforts shall include, but may not be limited to, the following:

- (1) Documentation of direct contact or negotiations with MBEs and WBEs for specific contracting opportunities, the actions taken shall be reported in a manner that will include the following items:
 - (A) A detailed statement of the efforts made to negotiate with MBEs and WBEs, including the following:
 - (i) The names, addresses, and telephone numbers of MBEs and WBEs contacted.
 - (ii) A detailed statement of the reason why prospective agreements were not reached.
 - (B) A detailed statement of the efforts made to select portions of the work proposed to be performed by MBEs and WBEs in order to increase the likelihood of achieving the stated goal.
- (2) Documentation of any advertising that the contractor performed in the search for prospective MBEs and WBEs for the contract.
- (3) Documentation of any notifications that the contractor provided to minority business assistance agencies for the purpose of locating prospective MBEs and WBEs for the contract.
- (4) Documentation of the contractor's efforts to research other possible areas of participation, including, but not limited to, any of the following:
 - (A) Suppliers.
 - (B) Shipping or transport firms.
 - (C) Engineering firms.
 - (D) Any other role that may contribute to the production and delivery of the product or service specified

in the contract.

(5) Documentation regarding the contractor's affirmative action policies or programs as they pertain to the utilization of MBEs and WBEs. This documentation should also provide an explanation of the methods used to carry out the affirmative action policies.

(6) Documentation relevant to any other efforts the contractor has made to assist MBEs and WBEs in overcoming the traditional barriers of participation in the industry affected by the contract.

(b) When considering an application for MBE/WBE program waiver, the department will consider the following, including, but not limited to:

(1) The methods utilized by the contractor.

(2) The time the contractor has allowed for a meaningful response to its solicitations.

(3) Statements received from MBEs and WBEs who have been listed as having been contacted by the contractor.

(c) The contractor shall maintain adequate records of all relevant data with respect to the utilization and attempted utilization of MBEs and WBEs, and shall provide full access to these records to the department upon its request to inspect them. *(Indiana Department of Administration; 25 IAC 5-7-5)*

25 IAC 5-7-6 Grant of waiver from project goal

Authority: IC 4-13-1-7; IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13-16.5; IC 5-16-6.5; IC 22-9-1-10

Sec. 6. Upon review and analysis of the documentation supplied to the department by the contractor, a determination will be made and the contractor will be promptly notified of the results. Such results may include the following:

(1) Notification that the contractor has been granted a waiver from the project goal and has been authorized to proceed without any MBE or WBE participation on the contract.

(2) Notification that the contractor has been granted a partial waiver from the project goal and has been authorized to proceed when MBE and WBE participation is greater than zero (0), but less than the project goal.

(3) Notification that further information will be required before a final determination may be made.

(4) Notification that the application for MBE/WBE program waiver has not been granted. In such a case, the following action may result:

(A) The contractor may be required to provide further information.

(B) The contractor's bid may be rejected.

(Indiana Department of Administration; 25 IAC 5-7-6)

25 IAC 5-7-7 Appeals process for bid rejection or denial of waiver

Authority: IC 4-13-1-7; IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13-16.5; IC 5-16-6.5; IC 22-9-1-10

Sec. 7. (a) Upon notification that the application for MBE program waiver has been denied, the contractor may request a hearing with the MBE compliance review committee. The request for the hearing of an appeal shall be directed to:

MBE Compliance Review Committee
c/o Indiana Department of Administration
Indiana Government Center-South
402 West Washington Street
Indianapolis, Indiana 46204.

(b) In the appeals process, the committee shall be responsible for the following activities:

(1) Arrange a time and place to hear the contractor's appeal within five (5) working days of the date of the receipt of the contractor's request for the hearing.

(2) Provide the contractor with every opportunity to present the reason for the appeal.

(3) Review and discuss all of the information at hand, including the following:

- (A) MBE availability.
 - (B) The contractor's original efforts towards MBE utilization.
 - (C) Statements from MBEs listed in the documentation supplied by the contractor.
 - (D) The arguments offered by the contractor at the hearing.
- (4) Arrive at a final determination within five (5) working days after the conclusion of the appeal hearing.

(c) If the contractor is dissatisfied with the decision made by the MBE compliance review committee, the contractor may, within five (5) working days of receiving the committee's determination, request of the commissioner, in writing, a review and reconsideration of the decision and submit additional written material. The commissioner or designee will consider the request and issue a written decision within ten (10) working days after receipt of all material. (*Indiana Department of Administration; 25 IAC 5-7-7*)

25 IAC 5-7-8 Sanctions; contractors

Authority: IC 4-13-1-7; IC 4-13-2-9; IC 4-13-6-3-1

Affected: IC 4-13-16.5; IC 5-16-6.5; IC 22-9-1-10; IC 35-43-5-9; IC 35-44-2-1

Sec. 8. (a) In the event of a violation of this rule, the department shall notify the contractor of the violations and will seek a course of action to correct them. The selected course of action may include the recommendation for the imposition of sanctions for material breach of contract if any of the following are determined:

- (1) The contractor has not demonstrated a good faith effort to comply with this rule.
- (2) The contractor has failed to cooperate in providing information regarding its good faith efforts to comply with this rule.
- (3) The contractor provides false or misleading information concerning its minority business enterprise contracting activity or in relation to the contractor's good faith efforts to comply with this rule.
- (4) The contractor fails to make prompt payment to a minority business for services, materials, or labor, whether with respect to the present contract or a previous contract between the contractor and the minority business, unless the contractor, in good faith, contests the payment or any part of it. The contractor fails to promptly pay the uncontested part to the minority business in the event the contractor, in good faith, contests part of a payment.
- (5) The business enterprise provides false or misleading information concerning its status as a bona fide entity which is owned and actively controlled by racial minorities.
- (6) The contractor subjects an MBE to unlawful discriminatory conduct.

(b) In the event that it is determined that a violation of this rule has occurred, the department may elect to immediately employ one (1) or more of the following sanctions:

- (1) Withholding payments on the specific contract in which the deficiency is known to exist until such time that satisfactory corrective measures are made.
- (2) Adjustment to payments due or the permanent withholding of retainages of the specific contract in which the deficiency is known to exist.
- (3) Suspension or termination of the specific contract in which the deficiency is known to exist. In the event that this sanction is employed, the contractor will be held liable for any consequential damages arising from the suspension or termination of the contract, including damages caused as a result of the delay or from increased prices incurred in securing the performance of the balance of the work by other contractors.
- (4) Recommendation to the certification board to revoke the contractor's certification status with the public works division of the department. This recommendation may result in the suspension or revocation of the contractor's ability to perform on future state contracts for a period no longer than thirty-six (36) months.
- (5) Suspension, revocation, or denial of the MBE certification and eligibility to participate in the MBE program for a period of not more than thirty-six (36) months.

(c) In the event that sanctions are required, they may be employed immediately. Suspension or stay is in the sole discretion of the commissioner.

(d) In the event that the contractor has provided false or misleading information, the department may elect to provide the information to the appropriate investigating agencies for investigation and enforcement of any

possible criminal violations or relevant statutes under IC 35-43-5-9 or IC 35-44-2-1.

(e) In the event that the contractor fails to pay the minority business in a timely manner or fails to satisfactorily resolve any outstanding claims, the department may elect to withhold the disputed amount from the payments due to the contractor and may elect to suspend or terminate the contract.

(f) In the event that the minority business enterprise has provided false or misleading information, the department may elect to provide the information to the appropriate investigating agencies for investigation and enforcement of any possible criminal violations of relevant statutes. *(Indiana Department of Administration; 25 IAC 5-7-8)*

25 IAC 5-7-9 Appeals process for violations ruling or sanctions imposed

Authority: IC 4-13-1-7; IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13-16.5; IC 5-16-6.5; IC 22-9-1-10

Sec. 9. (a) Upon notification of the determination of rules violations or sanctions imposed, the contractor may request a hearing before the MBE compliance review committee. The request for the hearing of an appeal shall be directed to:

**MBE Compliance Review Committee
c/o Indiana Department of Administration
Indiana Government Center-South
402 West Washington Street
Indianapolis, Indiana 46204.**

(b) In the appeals process, the committee shall be responsible for the following activities:

- (1) Arrange a time and place to hear the contractor's appeal within five (5) working days of the date of the receipt of the contractor's request for the hearing.
- (2) Provide the contractor with every opportunity to present the basis for the appeal.
- (3) Review and discuss all of the information at hand and the arguments offered by the contractor at the hearing.
- (4) Arrive at a final determination within five (5) working days after the conclusion of the hearing.

(c) If the contractor is dissatisfied with the decision made by the MBE compliance review committee, the contractor may, within five (5) working days of receiving the committee's determination, request of the commissioner, in writing, a review and reconsideration of the decision and submit additional written material. The commissioner or designee will consider the request and issue a written decision within ten (10) working days after receipt of all material. *(Indiana Department of Administration; 25 IAC 5-7-9)*

Rule 8. Commission Members

25 IAC 5-8-1 Ethics of commission members

Authority: IC 4-13-1-4; IC 4-13-1-7; IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13-1; IC 4-13.5-1; IC 4-13.6; IC 5-22

Sec. 1. Commission members shall abide by all applicable state statutes, administrative rules, policies, and guidelines regarding ethical conduct. *(Indiana Department of Administration; 25 IAC 5-8-1)*

SECTION 2. THE FOLLOWING ARE REPEALED: 25 IAC 2-19; 25 IAC 2-20.

Notice of Public Hearing

Under IC 4-22-2-24, notice is hereby given that on October 28, 2002 at 1:30 p.m., at the Indiana State Museum Auditorium, 650 West Washington Street, Indianapolis, Indiana the Indiana Department of Administration will hold a public hearing on proposed new rules regarding minority and women's business enterprises consistent with IC 4-13-16.5. Copies are available at the Web site for the Department of Administration at www.state.in.us/idoa.minority.

Copies of these rules are now on file at the Indiana Government Center-South, 402 West Washington Street, Room W474 and Legislative Services Agency, One North Capitol, Suite 325, Indianapolis, Indiana and are open for public inspection.

Glenn R. Lawrence
Commissioner
Indiana Department of Administration